FILE COPY

No. 803

JAMES R. BROWNING

In the Supreme Court of the United States

OCTOBER TERM, 1960

ERNEST J. SAUBER, PETITIONER

v.

HOWARD B. GLIEDMAN

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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OPINIONS BELOW

The opinion of the district court (App. 40-42)[1] is not reported. The opinion of the Court of Appeals for the Seventh Circuit (Pet. App. A, pp. 13-18) and the opinion on motion for rehearing, amending the opinion and denying the motion for rehearing (Pet. App. A, p. 19), are reported at 283 F. 2d 941.

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[1] "App." refers to the "Appendix for Plaintiff Appellant" in the court of appeals, now on file in this Court.

JURISDICTION

The judgment of the court of appeals was entered on November 10, 1960 (Pet. App. B, p. 20). The order of the court of appeals denying the petition for rehearing was entered on December 12, 1960 (Pet. App. B, p. 21). The petition for a writ of certiorari was filed on March 13, 1961. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the public statements made by respondent, a Special Assistant to the Attorney General of the United States, were absolutely privileged.

STATEMENT

Petitioner commenced this action for slander and libel to recover for allegedly false, malicious and defamatory statements made by respondent Gliedman, a Special Assistant to the Attorney General, at a press conference. The district court granted respondent's motion for summary judgment on the ground that the statements were related to the performance of respondent's official duties and, consequently, were absolutely privileged (App. 40-42). The court of appeals affirmed (Pet. App. A, pp. 13-18).

1. *The relevant facts.* Petitioner, formerly a District Director of Internal Revenue in Chicago, Illinois, was removed from his office in 1956 (App. 4, 8, 10). On February 27, 1957, he was indicted, together with

four other individuals, for conspiracy to defraud the United States of income taxes due and to commit perjury and for other offenses. *United States* v. *Sullivan*, No. 57, CR 149, District Court for the Northern District of Illinois, Eastern Division (Pet. 2). These indictments grew out of the criminal tax evasion case of *United States* v. *Shotwell-Manufacturing Co.*, 225 F. 2d 394 (C.A. 7), vacated and remanded, 355 U.S. 233.[2]

The United States Attorney for the Northern District of Illinois disqualified himself from the prosecution of the indictment in the *Sullivan* case (App. 9). The Attorney General then appointed respondent as a Special Assistant to the Attorney General, and placed him in charge of the prosecution of the indictment and of the investigation of the Internal Revenue Service in Chicago. Gliedman was given authority:

> * * * to assist in the trial of the case or cases growing out of the transactions hereinafter mentioned in which the Government is interested; and in that connection you are specifically directed to file informations and to conduct in the Northern District of Illinois and in any other

[2] In 1956, the United States filed in the *Shotwell* case, then pending before this Court on a petition for a writ of certiorari, a motion to remand the cause to the district court. The motions and supporting affidavits charged that the defendants in *Shotwell* and petitioner Sauber had conspired to cause the dismissal of the *Shotwell* prosecution, by claiming falsely that the defendants in that case had made a voluntary disclosure of their tax derelictions before any investigation had been initiated by the Internal Revenue Service (see, 355 U.S. at 234-240).

> judicial district where the jurisdiction thereof lies, any kind of legal proceeding, civil or criminal, including grand jury proceedings and proceedings before committing magistrates which district attorneys are authorized by law to conduct. [Pet. App. C., p. 22.]

Gliedman was provided with a staff of three assistants and an administrative aide (App. 9).

Respondent took his oath of office on March 6, 1957 (Pet. App. C, p. 24). The following day he held a press conference (App. 5), in which he explained to the representatives of certain Chicago newspapers the reasons for his appointment as Special Assistant to the Attorney General, and the purpose and scope of his assignment (App. 5, 8-11). Certain statements allegedly made by respondent at this conference constitute the basis of this action.

2. *Proceedings below.* On March 14, 1957, petitioner commenced this suit by filing a complaint which alleged in substance that respondent "falsely and maliciously" had made the following "defamatory" statements to the press (App. 5-6):

> To conduct work preparatory to the Sauber trial to seek "possible further corruption."
>
> "When you have a man who was district director indicted for conspiracy to defraud the U.S. government of money, it doesn't take a genius to see something is wrong."
>
> "This is not a witch hunt, and it should be good for employee morale, because an awful cloud has been hanging over the Chicago office."
>
> "If nothing is there, we won't put it there."

Respondent moved for summary judgment on the ground that the statements attributable to him "had been made in the line of duty and consequently were absolutely privileged * * *" (Pet. 3). The motion was supported by an affidavit of Assistant Attorney General Warren Olney, III, which stated in part (App. 19):

> Howard B. Gliedman is in charge of the prosecution of the case of United States *vs.* Harold E. Sullivan, Byron A. Cain, Leon J. Busby, Ernest J. Sauber, and Ralph R. Johnson, as well as in charge of the investigation of alleged irregularities in the office of the Director of Internal Revenue, Chicago, Illinois.
>
> Howard B. Gliedman entered upon the above assignment on March 5, 1957, and he is performing this function in the capacity of Special Assistant to the Attorney General of the United States pursuant to authorization by the Attorney General of the United States.
>
> In his capacity as Special Assistant to the Attorney General of the United States, Howard B. Gliedman is authorized and expected to conduct relations with the press, and to make such public statements as are called for in connection with his assignment.

The affidavit was not controverted by petitioner when he filed his memorandum in opposition to respondent's motion for summary judgment[3] (see App. 23).

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[3] Subsequently, when respondent filed his own affidavit with his reply memorandum, petitioner moved to strike the affidavit, or, in the alternative, to have the application for judgment refused under Rule 56(f), F.R.Civ.P. Attached to

On September 24, 1957, the district court, holding that respondent's duties were in substance only those of a prosecuting attorney and not comparable to those of a cabinet member, denied respondent's motion for summary judgment on the authority of the decision of the Court of Appeals for the District of Columbia Circuit in *Barr* v. *Matteo*, 244 F. 2d 767 (App. 27-35).

On June 29, 1959, this Court reversed the decision of the court of appeals in the *Barr* case. 360 U.S. 564. Thereupon, respondent filed a renewed motion for summary judgment supported by the Olney affidavit (App. 38).[4] The district court granted the motion, holding that this Court's decision in the *Barr* case was controlling (App. 41-42); accordingly, the district court dismissed the complaint (App. 42).

The court of appeals affirmed, holding that "[m]easured by the criteria set forth in * * * [*Barr*

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the motion was an affidavit by one Johnston, an attorney associated with petitioner's counsel, which stated, without setting forth any basis for the assertion, that Gliedman was not authorized or expected to conduct relations with the press or to make public statements in connection with the duties assigned to him as a Special Assistant to the Attorney General (App. 23-26). The procedural status of these two later affidavits is not clear (see App. 34-35). However, the Johnston affidavit was entirely insufficient to controvert the facts of Gliedman's authority as set forth in the Olney affidavit. See *Preble* v. *Johnson*, 275 F. 2d 275, 279 (C.A. 10); 6 Moore, *Federal Practice* (2d ed.), par. 56.22, p. 2329. In any event, the affidavit was not submitted on Gliedman's second motion for summary judgment.

[4] The record does not disclose any affidavit filed by petitioner in opposition to this motion (see App. 38-40, 45).

v. *Matteo*, 360 U.S. 564], Gliedman's statements to the press call for the application of the doctrine of absolute privilege." The court went on to say that "[i]n respect to his legal assignment of prosecutor and investigator of Sauber and the Department of Internal Revenue in Chicago, Gliedman was the direct representative of the Attorney General of the United States. As such representative * * *, Gliedman held the responsibilities, duties, and discretion of the Attorney General of the United States, limited in scope only to the proceedings assigned to him." (Pet. App. A, p. 17). The court further pointed out that (Pet. App. A, pp. 17-18):

> His superior officer certified that Gliedman was authorized and expected to conduct relations with the press and to make such public statements as were called for in connection with his assignment. The statement to the press complained of here related to the subject matter of Gliedman's assignment. Irregularities in the performance of their duties by important public officials are of great public concern, and the public has a right to be informed as to the steps taken by the proper governmental agency to investigate and correct abuses of authority.
>
> Liability to respond in damages in an action based on defamatory statements to the press relating to matters within his power and discretion and of public interest and concern might seriously interfere with the performance of the duties of a Special Assistant to the Attorney General of the United States.

ARGUMENT

The principles laid down by this Court in *Barr* v. *Matteo*, 360 U.S. 564, are controlling in the present case. Since the case turns entirely upon the application of those principles to the particular facts and circumstances, no question of general importance is presented; moreover, the decision below is clearly correct. The petition for a writ of certiorari should therefore be denied.

In the *Barr* case and in *Howard* v. *Lyons*, 360 U.S. 593, decided the same day, this Court confirmed the rule that acts of public officials, including their statements to the press, which are related to matters committed to their control or supervision are absolutely privileged. In so doing, the Court reaffirmed its earlier ruling in *Spalding* v. *Vilas*, 161 U.S. 483, and *Yaselli* v. *Goff*, 12 F. 2d 396 (C.A. 2), affirmed, 275 U.S. 503 (absolute privilege to Special Assistant to Attorney General), and ratified the decisional law of the lower courts.[5]

Petitioner seeks review by this Court on the grounds that (1) the decision in *Barr* is limited in scope to persons in positions similar to that held by Barr, and (2) the action by the respondent was not related to matters committed by law to his control or supervision. Each assertion rests upon a fundamental misconception. In the first, petitioner

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[5] See *Barr* v. *Matteo*, 360 U.S. at 572 and fn. 9; 3 Davis, *Administrative Law Treatise*, Sec. 26.01 (Pocket part, 1960) ("the law before the Barr decision was overwhelmingly what the majority held it to be in the Barr case * * *").

wholly misconstrues the *Barr* holding, and in the second, he mistakenly limits the scope of respondent's authority and duties.

1. Petitioner plainly attempts to distort this Court's decision in *Barr* (Pet. 6, 7) as holding that the "outer perimeter of absolute privilege" is reached when an agency head of Barr's rank and policy-making status makes a public statement with respect to a matter where the integrity of the agency and the official has been directly and severely challenged in charges made in the Congress. But this Court did not use the words "outer perimeter" in any such context; rather, it said (360 U.S. at 575 (emphasis added)) that the fact that Barr's action "was within the *outer perimeter of* [*his*] *line of duty*" was enough to make the privilege applicable, "despite the allegations of malice in the complaint." The Court emphasized that (*id.* at 573-574):

> It is not the title of his office but the duties with which the particular officer sought to be made to respond in damages is entrusted—the relation of the act complained of to "matters committed by law to his control or supervision," *Spaulding* v. *Vilas*, *supra*, at 498—which must provide the guide in delineating the scope of the rule which clothes the official acts of the executive officer with immunity from civil defamation suits.

The Court also pointed out (*id.* at 571) that the reason for the recognition of privilege is that "officials of government should be free to exercise their duties unembarrassed by the fear of damage suits in respect of acts done in the course of those duties—

suits which would consume time and energies which would otherwise be devoted to governmental service and the threat of which might appreciably inhibit the fearless, vigorous, and effective administration of policies of government." As this Court recognized, it is not enough to grant absolute privilege only to officers of the cabinet. The sheer magnitude of government, and the attendant necessity for delegation and redelegation of governmental functions and duties, has made increasingly important the roles which numerous inferior officials fill in the administration of public matters and has put inferior officers in the position of exercising the discretion of their superiors in dealing with the general public on subjects related to "matters committed by law to [their] control or supervision" (*id.* at 573).

2. Measured by the criteria in the *Barr* opinion, the court of appeals was correct in holding that respondent's challenged action was absolutely privileged. The attendant circumstances and the range of respondent's responsibilities clearly indicate that the holding of the press conference was related to matters under the supervision and control of respondent. Petitioner, a District Director of Internal Revenue, had been indicted, and the Chicago Office of the Internal Revenue Service was under investigation. The public was therefore obviously interested in the operation of this important government agency. Clearly, any pertinent information given to the public on steps being taken by the Department of Justice in the matter would have served to further public confidence in proper

governmental administration. Since there is no question that the Attorney General would have been absolutely privileged had he discussed these matters with the press (*Barr* v. *Matteo*, *supra*, 360 U.S. at 574-575, 577-578; *Mellon* v. *Brewer*, 18 F. 2d 168, 171 (C.A. D.C.), certiorari denied, 275 U.S. 530; *Glass* v. *Ickes*, 117 F. 2d 273 (C.A. D.C.), certiorari denied, 311 U.S. 718), and since the authority of the Attorney General to hold a press conference was implicitly delegated to respondent, respondent was also absolutely privileged.

Petitioner persists in characterizing respondent as a mere "prosecutor" [6] but, clearly, the latter's duties were not thus restricted. He was appointed as a Special Assistant to the Attorney General and was charged not only with the prosecution of the indictment in which petitioner had been named, but also with the investigation of other possible offenses. In this connection, he was directed and empowered to file informations, and to conduct civil and criminal proceedings, including grand jury proceedings and proceedings before committing magistrates.[7] Within

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[6] Petitioner's apparent purpose is two-fold, (1) to attempt to rule out any representation by respondent of the Attorney General and, therefore, any exercise of the discretion attendant upon such representation; and (2) to bring Gliedman within the decision in *Jacobs* v. *Herlands*, 17 N.Y.S. 2d 711, affirmed, 19 N.Y.S. 2d 770, from which petitioner quotes at length in the petition (pp. 10-11). In no event can the *Jacobs* case be controlling here, however, since federal law is applicable. See *Howard* v. *Lyons*, 360 U.S. 593.

[7] In view of these powers and his position as Special Assistant to the Attorney General, respondent was entitled to immunity through absolute privilege, if only because of the

the ambit of these powers and duties, respondent was the representative of the Attorney General and held the responsibilities, duties, and discretion of the Attorney General. To hold otherwise would be an "unduly restricted view"[8] of respondent's assignment. Indeed, it may well be said that to fail to grant absolute privilege here would hamper the internal operation of the executive branch as surely as it would if such privilege were denied the Attorney General in a like situation.[9] In noting in the *Barr* case that in government today "there must of necessity be a delegation and redelegation of authority as to many functions" (360 U.S. at 573), the Court specifically referred to the Office of the Attorney General and to the fact that, in the early days of the Republic, the Attorney General personally performed all the functions of that office.

Furthermore, the record bears out respondent's authority. The affidavit of Assistant Attorney General Olney states not only that respondent was authorized, but that he was "expected", to conduct relations with the press (App. 19). It was not necessary that the Attorney General specifically direct, request or author-

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close relation of his duties to the judicial branch of the government. Cf. *Yaselli* v. *Goff*, *supra*; *Bradley* v. *Fisher*, 13 Wall. 335, 347.

[8] *Barr* v. *Matteo*, *supra*, 360 U.S. at 574-575.

[9] For purposes of this case, it is not necessary to interpret *Barr* as extending absolute privilege to an executive officer who was not in such a representative capacity, but by this we do not mean that *Barr* should not be so interpreted.

ize respondent, in his letter of authority, to hold a press conference in order to make it an "official action". See *United States* v. *Birdsall*, 233 U.S. 223, 230-31; *Cooper* v. *O'Connor*, 99 F. 2d 135, 139 (C.A. D.C.), certiorari denied, 305 U.S. 643. The uncontradicted affidavit of the Assistant Attorney General, while not conclusive on the courts, fully supports a judicial determination that respondent's statements to the public were "in the discharge of [his] * * * official duties and in relation to matters committed to him for determination." *Howard* v. *Lyons*, *supra*, 360 U.S. at 597-598. Respondent's action was therefore absolutely privileged, and the court of appeals was entirely correct in so holding.

3. *De novo* appraisal by this Court is neither necessary nor warranted. Since the decisions in *Yaselli* v. *Goff*, *supra*, and *Spalding* v. *Vilas*, *supra*, the courts of appeals and district courts have established a large body of case law to the effect that public officials, whether or not they hold cabinet rank, are immune from private tort suits based upon acts which, as those here involved, are found to be connected with their public duties. In such cases, it appears that petitions for writs of certiorari, if filed, have been uniformly denied.[10] Moreover, because of

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[10] See, *e.g.*, *Newbury* v. *Love*, 242 F. 2d 372 (C.A.D.C.), certiorari denied, 355 U.S. 889; *Papagianakis* v. *The Samos*, 186 F. 2d 257 (C.A. 4), certiorari denied, 341 U.S. 921; *Gregoire* v. *Biddle*, 177 F. 2d 579 (C.A. 2), certiorari denied, 339 U.S. 949; *Laughlin* v. *Garnett*, 138 F. 2d 931 (C.A. D.C.), certiorari denied, 322 U.S. 738; *Jones* v. *Kennedy*, 121 F. 2d 40 (C.A.D.C.), certiorari denied, 314 U.S. 665;

this Court's decisions in the *Barr* and *Howard* cases, there is even less justification for review in the present case.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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APRIL 1961

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